88-1019

Supreme Court, U.S.
FILED
NOV 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1988

HERBERT D. BERKSON,

Petitioner

v.

DEL MONTE CORPORATION, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

PETITION OF HERBERT D. BERKSON

HERBERT D.. BERKSON
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45 pp

Other Defendant Parties

United Brands Company, William A. Rogers, Henry A. Kissinger, Price Waterhouse, Palmer & Dodge, Goodwin, Procter & Hoar, Pillsbury, Madison & Sutro, Covington & Burling and Nathaniel Davis

ISSUES PRESENTED

1. Does the Statute of Limitations apply to persons and/or entities who violated the Anti-Deficiency Act of 1977 as surrogates of the Central Intelligence Agency (CIA) and the United States Department of Justice in depriving a citizen of his contractual rights and property without due process of law and just compensation?

2. Did the Appeals Court of the First Circuit err in its ruling that the petitioner did not bring a timely action under the Racketeer Influenced and Corrupt Organizations Act (RICO)?

TABLE OF CONTENTS

	Page
Issues Presented	1
Procedural History	1
Statement of Facts	14
Argument I	18
Argument II	26
Conclusion	28

TABLE OF AUTHORITIES CITED

Cases	Page
Agency Holding Corp. v. Malley-Duff & Assoc., Inc. 107 S.Ct. 2759 (1987)	8,23
Bennett v. Berg, 685 F. 2(d), 1053 (8th Cir. 1983)	27
Berkson v. DelMonte, et al CA No. 79-1180T (D.Mass. August 5, 1983), aff'd 743 F.2d 53 (1st Cir. 1984), cert. denied, ____ US ____, 195 Ct. 1765 (1985)	7
City of New York v. Margaret Heckler, Docket No. 84-6037-No. 1095- August Term 1983)(2nd Circuit)	20
Mitchell v. Forsyth, S. Ct. (No. 84-335)	12
Sedima, S.P.R.L. v. Imrex Company, 105 S.Ct. 3275, 3285 (1985)	27
United States v. United Fruit Civil No. 4560 (E.D. La 1958)	8

STATUTES

18USC 371 201 1961c. 1341, 1943 1503 1621, 1622, 1623	8

	Page
Foreign Corrupt Practices Act	13,14,18
Securities & Exchange Acts of 1933 and 1934	14
Anti-Deficiency Act (1982)	,18,22,26

PROCEDURAL HISTORY

This matter arose when the petitioner and his associate, Julian Presa, in the Pan-Tropic Fruit Company were approved by the Guatemalen Government as the purchaser of the United Fruit divestiture properties in Guatemala pursuant to a judgment issued by

the Federal District Court of Eastern Louisiana.

The US Justice Department, the Del Monte Corporation and the United Fruit & Brands Company appeared before Judge Seybourn Lynne in the Federal District Court in Birmingham, Alabama, on November 29, 1972 for the purpose of obtaining the Court's approval of the sale of the divestiture properties in Guatemala to DelMonte.

The petitioner appeared pro-se as amicus curiae at the hearing on November 29, 1972, alleging that his associate, Julian Presa, a Guatemalan national, was being harassed and threatened by United Fruit and DelMonte in Guatemala in an effort to keep the Presa group from bidding for said properties. However, the Presa group, which included the petitioner, did, in fact, make a bid.

The petitioner, appearing pro-se before Judge Lynne at said hearing, filed a brief alleging that the actions of United Fruit and

Del Monte were in violation of the divestiture decree of 1958 as a result of their concerted efforts to have DelMonte, and DelMonte alone, the exclusive purchaser. The Court was also informed that the Presa group not only had the approval of the Guatemalan government to become the purchaser but that its bid was equal to that of DelMonte.

Judge Lynne issued a decree allowing the purchase without comment of any kind on the claims of the petitioner.

The Justice Department being a party and represented by John Wilson, the overseer of the consent decree of 1958, assented to DelMonte's purchase.

As a result of the Wall Street Journal article of July 14, 1975, which exposed Del Monte's questionable payments in Guatemala (circa 1972) (documented in record of the Court below), the petitioner started a law action against United Fruit and DelMonte claiming violations of the consent decree of 1958 and continuing restraint of trade.

This action was brought in June 1979. Said complaint was dismissed by Judge Joseph Tauro of the Massachusetts Federal District Court on the ground that the action was not timely. The US First Circuit Court of Appeals affirmed said Justices's decision even though it made the statement:

> "We hesitate to infer that Berkson knew of facts sufficient to support a claim in 1972".

A writ of Certiorari to the United States Supreme Court was denied. As a result of discovery in the above mentioned case, which discovery was finally allowed over dilatory objections, the petitioner obtained said documents from DelMonte on or about the month of May 1983. These DelMonte internal documents contained evidence indicating payments made by DelMonte totalling about $500,000 US Dollars over a 6-month period for the purpose of reversing the approval by the Guatemalan Government of the petitioner and the Presa group as the desired bidders (documented in the record of the lower Court).

One of the DelMonte numbered internal documents referred to a meeting held on February 19, 1971, in Judge Lynne's chambers, supra, during which Raymond Philipps and John Wilson, representing the United States Justice Department, had represented to the Court that the Guatemalan Government had approved only DelMonte and no other purchaser of the devestitute assets (documented in the record of the lower Court). The US Justice Department knew that the petitioner and his associate, Julian Presa, and their Pan Tropic Fruit Company was the group to be negotiated with before any other as stated by the Guatemalan Government.

The basis evidencing the US Justice Department's knowledge of the petitioner and his associate's approval and selections by the Guatemalan Government was a memorandum by John Wilson to his file in the Justice Department dated January 20, 1971, stating that:

> "On January 15, James McGlothin, counsel for United, telephoned to report that a Guatemalan Government commission studying the request for permission to transfer the United properties to DelMonte has issued a report. The report, according to Mr. McGlothin recommends that the transaction not be approved until United first has negotiated with a group (Presa) of potential purchasers headed by the petitioner and Harry Kaplan which includes Guatemalan citizens."
> (documented in the record of the lower Court).

Therefore, based on said Justice Department official documents, the petitioner contends that although the overseers of the United Fruit consent decree, namely; John Wilson and Raymond Philipps unquestionably knew on January 20, 1971, that the Guatemalan Government preferred the petitioner's company, PanTropic, as the purchaser of the divestiture, they deliberately on February 19, 1971, one month later, falsely represented to Judge Lynne, the fashioner and monitor of said decree that the Guatemalan Government preferred DelMonte and DelMonte only as the purchaser.

These Government officials, Wilson and Philipps, perpetrated a massive fraud on the consent decree and the Federal Court itself.

Upon the dismissal of the petitioner's action against United Fruit & Brands and Del Monte, supra, and as a result of the internal documents obtained in May 1983, supra, the petitioner brought an action under the RICO Statute. Berkson v. DelMonte, et al, Civil Action No. 79-1180T (D. Mass. August 5, 1983), aff'd 743 F.2d 53 (1st Cir. 1984), cert. denied, ____ US ____, 105 Ct. 1765 (1985).

The said RICO action was commenced on September 26, 1986, against the DelMonte Corporation, United Fruit and Brands, their attorneys, their accountants, Price Waterhouse and several Government officials in the State Department claiming that they conspired to violate and did violate the consent decree in 1972 and, inter alia committed acts of bribery, perjury, mail wire, immigration and banking fraud, and obstruction of justice, which acts permitted and continue to permit

United Fruit and Brands and DelMonte to enjoy a shared monopoly in the banana market to the detriment of the American buying public and in a continuing violation of the United Fruit consent decree of 1958. Consent decree in United States v. United Fruit Co., Civil No. 4560 (E.D. La 1958). 18 USC 371, 18 USC 201, 18 USC 1961 (c), 18 USC 1341, 1343, 18 USC 1503, 18 USC 1621, 1622, 1623, 18 USC 1005.

The Massachusetts District Court dismissed said RICO action claiming that the petitioner1 did not bring the action within the statute of limitations of four years under RICO, Supreme Court in Agency Holding Corp. v. Malley-Duff & Associates, Inc., 107 S. Ct., 2759 (1987). The District Court, in dismissing, claimed that the petitioner did not bring the action within the statute of limitations parameters under the RICO Statute, giving as a reason that the petitioner had information in 1975 as a result of the Wall Street Journal article of July 14, 1975 which exposed DelMonte's bribery in Guatemala

(documented in the record of the lower Court). Said Journal article revealed that DelMonte made these payoffs in order to influence the then Guatemalan government to also approve DelMonte as the purchaser of the divestiture assets.

The petitioner appealed said dismissal to the US First Circuit Court of Appeals, which Court issued a written decision on June 29, 1988. This decision is part of the Appendix to this appeal. The First Circuit Court found, inter alia, that defendants and their attorneys had perjured themselves, (see First Circuit decision on pages 4 and 5). However, the First Circuit upheld the dismissal even though under the RICO Statute the defendants continued each and every day to violate the consent decree, continue to act in a non-rival manner while enjoying the fruits of their fraud and that of the Justice Department upon the US Federal Court in the Eastern District of Louisiana and even though the documentary evidence compels that United

Fruit and Brands and DelMonte are Central Intelligence Agency's (CIA) proprietary operatives in Guatemala and other countries of Central America.

The First Circuit Court also ordered that its decision not be published presumably to cover up the perjury of several major law firms and of corporate counsel of Del Monte.

The petitioner appealed said decision to the full Appellate Court bench which denied said appeal without opinion.

In a strange reversal of a normal procedural behavioural pattern of the First Circuit, the chief Judge Levin Campbell allowed to be made part of the record of this case a newspaper article which it would normally refuse to allow because it was not part of the record of the District Court below. Obviously, the Judge thought that the information contained in the newspaper article, authored by the noted and distinguished historian/writer, Thomas Boylston Adams,and

appearing in the Boston Globe on August 13, 1988, sufficiently important to have it made part of the record for the Supreme Court to review as to its historic content and how the credible information therein will affect the final resolution of this case. The article in part states:

> "In a secret briefing at the White House in July 1954...a group of Central Intelligence Agency operatives told how they had overthrown the Government of Guatemala and replaced it with another of their own choosing...When President Eisenhower turned to spymaster, Allen Dulles and congratulated him on the achievement, a chain of events was set in motion of extraordinary impact that which continues today. It would ruin the reputation of one of the witnesses of the show, Richard Nixon. I would nearly wreck the administration of John Kennedy, and bring the world, with the Cuban missile crisis, closer to Armageddon than ever before. It would destroy the credibility of the Reagan administration with the Iranian scandal...All Eisenhower said was "Congratulations, you've averted a Soviet beachhead in our hemisphere...These words effectively released the CIA from future interference by other government agencies."

The petitioner has steadfastly maintained throughout the proceedings in the RICO action and the prior antitrust case that he has been victimized by the unlawful, clandestine and secretive policies of the United States Government in concert with its agents and surrogates, namely, the defendants, Del Monte and United, acting as proprietaries and intelligence ocvers for the CIA.

Did the First Circuit Court of Appeals, in allowing this Adams' article to become part of the Court record send a signal to the Supreme Court that it, the First Circuit considers the historically acknowledged information in said article worthy of consideration as it pertains to the petitioner and his case?

In Mitchell v. Forsyth, S. Ct. (No. 84-335) in which the Supreme Court denied the Attorney General and other top Federal officials absolute immunity from suit for violating an individual's legal or constitutional rights in the name of national security. In this holding by the Supreme

Court Justice Byron White commented:

> ..."The danger that high Federal officials will disregard Constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity...An attorney General 'May on occasion have to pause' to consider the Constitutionality of certain actions... we do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law."

The petitioner suspects that much of his grief stems from a clandestine presidential exemption to the "Foreign Corrupt Practices Act of 1977" under which certain select companies that serve as intelligence covers for the Central Intelligence Agency (CIA) if requested by the Director of said Agency (formerly Wm. Casey) and the Attorney General (formerly Edwin Meese) are exempt from upholding the law. The petitioner believes that the defendant companies in this matter, DelMonte and United Fruit have been given special exemption from filing accurate records with the Securities and Exchange

Commission (SEC) even though said exemption is in conflict with the requirements of accurate financial reporting to the SEC as demanded under the Securities Acts of 1933 and 1934 for the protection of shareholders in publicly held corporations. The defendant, Price Waterhouse, in this action also enjoys unconstitutional privileges to the detriment of the shareholders in DelMonte and United in addition to other corporations that it supposedly serves as a fiduciary agent while acting as a surrogate for the CIA in its clandestine covert operations.

The petitioner, herein, challenges the constitutionality of this presidential exemption to the "Foreign Corrupt Practices Act" becuase it is in Constitutional conflict with the Federal securities laws and is a disservice to the investing public.

STATEMENT OF FACTS

The only basis upon which DelMonte became the purchaser of United Fruit & Brands'

divestiture assets were the false and fraudulent statements made by the Justice Department through its attorneys, Raymond Philipps and John Wilson, to Judge Lynne in 1971.

Said evidence proving said fraud was discovered on or after May 1983.

But for said fraud and other acts of the Justice Department, such as bribery, perjury and fraud which said department was involved with the defendants of said action, the petitioner and its associates in the Presa group would have been the purchasers of said divestiture assets.

The petitioner and his associate, the Guatemalan national, Julian Presa, had obtained the approval of the Guatemalan government to purchase the Guatemalan divestiture properties and which approval simultaneously denied DelMonte the right to purchase said properties (documents in the record of the Court below).

The petitioner additionally had obtained the necessary financing to purchase

the assets in the amount of $23,000,000 Million Dollars (documented in the record).

United Fruit & Brands' approval of Del Monte as a purchaser rather than the petitioner and his associates is evidenced by its assent to the albeit false representation made by the attorneys of the United States Justice Department all of which were done to obtain Judge Lynne's approval of the sale of DelMonte.

The law firms representing said DelMonte and United Fruit, in some instances submitted perjured affidavits (documented in the record below). Their defenses and actions were knowingly unfounded and manipulated with intent to delay the petitioner.

They also knew or should have known that said baseless defenses and dilatory actions were violations of the Canons of Ethics. In addition, they knew or should have known that the Justice Department, together with their clients, through bribery and/or improper influence and/or misrepresentations interferred in the petitioner and his associate's

advantageous business relationship with the Guatemalan government.

Former Secretary of State at the time, William Rogers and the American ambassador to Guatemala, Nathaniel Davis, maneuvered behind the scenes to surreptitiously and unlawfully acquire the divestiture assets for Del Monte. In so doing, Rogers and Davis violated the Requirement of Neutrality required of all Federal officials while aiding and abetting a fraud on the United Fruit consent decree of 1958. Former Secretary of State Henry Kissinger successfully engineered the "quashing" of the criminal investigation of Del Monte's payoffs in Guatemala in 1975 (documented in the record below).

Covington & Burling, a defendant in this action, and one of the law firms representing United admitted in the Twelfth Defense of its Answers on November 3, 1986, that

> "This defendant...is immune from suit to the extent that it took action in concert with officials of the United States Government who were acting pursuant to their

official duties.."

This statement by Covington proves conclusively that it is in stark violation of the"Anti-Deficiency Act" (US Code 1982, Title 31) which makes it a crime for any private party to work, in the name of the United States Government without Congressional approval.

ARGUMENT I

The statute of limitations does not apply in the instant case where private persons and/or entitites act as agents of the Federal Government without proper authorization by Congress as propounded in the "Anti-Deficiency Act" and knowingly deprive a citizen of his property rights, namely; the petitioner's right to purchase the United Fruit divestiture properties in Guatemala.

The United States Justice Department exceeded its power in using its authority in antitrust matters to force out the petitioner and his Guatemalan associates, Presa and Fanjul,

from purchasing United Fruit's divestiture assets. The documentary evidence categorically shows that the Justice Department knowingly misrepresented to the Court (Judge Lynne) that DelMonte was the only purchaser approved by the Guatemalan government. The only reasonable inference for said fraud was to maintain and perpetuate a front for the covert operations of the Central Intelligence Agency (CIA) operations in Guatemala that United Fruit had heretofore provided on the same properties.

Although information gathering and security of same is and should be permitted, it cannot be done at the expense of an individual's advantageous business relationship and/or his property rights.

The Government is bound to uphold the Constitution and the rights protected thereunder. It's diliberate, although covert, taking of the petitioner and his associates' property rights in the name of security and/or public good is violative of the due

process clause of the Constitution.

The petitioner alleges and has evidence sufficient to raise an issue of fact that the private entities and/or persons involved were so involved as agents and surrogates of the Government and its objectives.

The law is that the statute of limitations is not applicable where the Government illegally deprives and/or takes the property of an individual without just compensation. In City of New York v. Margaret Heckler (Docket No. 84-6037- No. 1095 - August Term 1983)(2nd Circuit) which case pronounced principles of law concerning the tolling of the Statute of Limitations applicable to the facts in this case. The Court ruled:

> "All of the class members who permitted their administative or judicial remedies to expire were entitled to believe that their Government's determination of eligibility was the considered judgment of an agency faithfully executing the laws of the United States...where the Government's secretive conduct prevents plaintiffs from knowing of a violation

> of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action...since in this case the full extent of the Government's clandestine policy was uncovered in the course of this litigation. All class members may pursue this action notwithstanding the 60-day requirement."

In the instant case, only after the commencement of the prior antitrust action in 1979 did the petitioner learn that the Government agencies involved were not "faithfully executing the laws of the United States" and did not learn that the said Government agencies' secretive conduct prevented him from knowing of the violations of his rights. As a result of such actions, the statute of limitations should be tolled until the petitioner learned of the facts concerning said Government agencies' unfaithful and secretive actions. The Government and its agents and surrogates should not be able to profit from their own fraud by using the statute of limitations to bar the petitioner's

claims.

Agents or surrogates of the Government's said action cannot disclaim their para-governmental activities, which is also prohibited by the Anti-Deficiency Act, by a claim that the statute of limitations is applicable to affairs between private individuals is controlling. Said private individuals and/or entities who act as governmental surrogates are accountable to the same degree and extent that the Government is on the matter of the statute of limitations.

To hold otherwise, would amount to sponsoring and/or inducing the Government to violate the Anti-Deficiency Act in order to limit the time that the injured party has to bring action.

The petitioner had the inordinate and super human task to uncover facts buried by the Government in order to prove his case against these defendants.

Public policy dictates that statutes of limitation relevant to the ordinary

business affairs of men is not and should not be controlling, especially where the architect and moving force depriving a citizen of his property rights is the Government.

To hold otherwise gives rise to images of Constitutional deprivations of such enormity that would render the Constitution a mere slip of paper.

Alternatively, the measure should be one of reasonableness. The petitioner working pro-se and not being a lawyer and unable to obtain a lawyer willing to take on the Government and perhaps the Judiciary, brought his actions within a reasonable time frame.

In Agency Holding, 107 S. Ct. 2759 (1987) the Supreme Court of the United States held that the four-year statute of limitations governing Clayton Act civil enforcement actions, 15 USC, Section 15(b) constituted the applicable limitations period for civil RICO actions.

Although the US First Circuit of Appeals ruled that the petitioner should have brought

this instant RICO action prior to September 1982, instead of September 1986, the petitioner believes that the First Circuit erred monumentally.

It was only after receiving DelMonte's internal documents, produced under court order in the early part of 1983, that the petitioner's suspicions of the defendants' wrongful acts became actual knowledge. The petitioner did not have the crucial knowledge that was discovered in said documents prior to 1983.

It would have been foolhardy and imprudent on the petitioner's part to have brought suit on the meagre suspicions he had prior to 1983. The petitioner's original suspicions were buttressed and bolstered by the revelations contained in DelMonte's documents produced in 1983. The petitioner, therefore, maintains that a fair-minded and impartial jury would agree with him that he did not know of facts sufficient to have supported a claim prior to the 1983-1987 parameters of limitations. The petitioner steadfastly claims

that when he filed suit in September 1986, he was safely within the parameters of the statute of limitations, namely; the period between 1983 and 1987.

The involvement of the Government behind the scenes muddied the mosaic, the jigsaw of facts that the petitioner had to contend with before he could bring the whole overall conspiracy into sharp focus. The revelations of the wrongful acts perpetrated by all the defendants in this matter did not happen in one fell swoop. It took time and painstaking effort on the petitioner's part to link all the factors together which would eventually produce the clear picture of this conspiracy.

The petitioner's mistake was not including the Government as a party defendant. However, for all the reasons stated above, this case poses an issue which must be addressed by the Court. That issue being that the Court must allow this action in order for petitioner to prove that the fraud per-

pertrated on the Federal Court was part and parcel of denying the petitioner his property rights by surrogates of the Government without due process.

ARGUMENT II

The pattern of racketeering activity indicating a violation under the RICO statute continues to be operating and having as its base the original sin, to wit: the false and fraudulent apple that the Justice Department offered Judge Lynne of the Louisiana Court.

The defendants, DelMonte and United Fruits and Brands, continue to enjoy a shared monopoly in the American banana market under the aegis of the Central Intelligence Agency (CIA) and the US Justice and State Departments.

Said companies and their respective law firms have admitted to being agents and surrogates of said Government agencies in violation of the Anti-Deficiency Act as well as being in contempt of the United Fruit con-

sent decree of 1958.

The petitioner discovered the Government's fraud in 1983 when he obtained Del Monte's internal documents revealing this information.

The petitioner brought his RICO action in September 1986, well within the time parameters of the statute of limitations of four years, namely; 1983/1987.

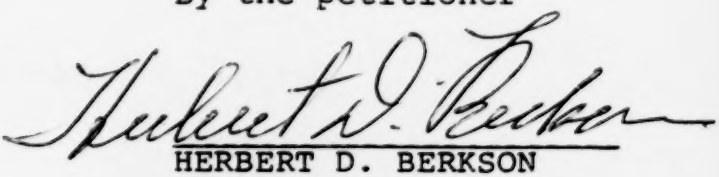
Additionally, civil RICO was not firmly established until the Supreme Court decided it in its 1985 decision, Sedima, S.P.R.L. v. Imrex Company, 105 S. Ct. 3275, 3285 (1985). Furthermore, one of the leading commentators on RICO, Professor G. Robert Blakey, former chief counsel to the Senate sub-committee which proposed RICO, has stated "that prior to 1983, civil RICO was essentially uncharted territory and that because of the chaotic state of the law prior to 1983 that jurisprudence (under civil RICO) could hardly be said to have been authoritively determined before Bennett. Bennett v. Berg, 685 F.2(d) 1053 (8th Cir. 1983)

CONCLUSION

The petitioner hereby requests that a writ of certiorari be issued to the panel of judges of the United States Court of Appeals for the First Circuit who rendered the decision on this case, directing them to certify to this Honorable Court a true, complete and perfect record of all the proceedings before them in the appeal of Berkson v. DelMonte, et al, No. 87-1539 in said files of said Appeals Court, together with all pleadings and papers. To the end that any errors of law may be determined or corrected by this Court and to enable this Court to determine whether the finding and decision of the First Circuit Court of Appeals are warranted as a matter of law upon the evidence before it. Your petitioner further requests that the finding and decision of the panel of the United States Court of Appeals for the First Circuit may be quashed and reversed, and for such other

and further belief as law and the cause of justice may require.

By the petitioner



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Dated: November 25, 1988

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 87-1539

HERBERT D. BERKSON

Plaintiff, Appellant

v.

DEL MONTE CORPORATION, ET AL

Defendants/Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASS.

(Hon. David S. Nelson, US District Judge)

Before

Campbell, Chief Judge

Coffin and Selya, Circuit Judges

Herbert D. Berkson on brief pro se.
Craig E. Stewart, John T. Harding, and Palmer & Dodge for appellees, Palmer & Dodge and Pillsbury, Madison & Sutro
Thomas J. Griffin, Jr. and Goodwin, Procter & Hoar on brief for appellee, Procter & Hoar. Thomas J. Griffin, Jr., Richard A. Oetheimer, Gordon H. Piper and Goodwin, Procter & Hoar on brief for appellee, United Brands Company.

Christine M. Roach, Assistant US Attorney and Frank L. McNamara, Jr., Acting United States Attorney, on brief for appellees, Henry Kissinger, William P. Rogers and Nathaniel Davis
Jennifer A. Kemp, Jeffrey B. Rudman and Hale & Dorr on brief for appellee, Price Waterhouse.
Jack R. Pirozzolo, Richard L. Binder, Willcox, Pirozzolo & McCarthy Professional Corporation on brief for appellee, Covington & Burling.
Paul B. Galvani and Ropes & Gray on brief for appellee, Del Monte Corporation.

June 29, 1988

Per Curiam. The Judgment of the District court is affirmed substantially for the reasons stated in the magistrate's report and recommendation adopted by the district court.

The magistrate found that plaintiff, Herbert D. Berkson's claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC, Section 1961 et seq., against all defendants were timebarred (whereas principles of res judicata were found to preclude Berkson's claims against those defendants who were parties to plaintiff's prior federal suit, Berkson v. DelMonte Corp. 743 F. 2d (1st Cir. 1984), cert denied, 470 US 1056 (1985).

In so finding, the magistrate applied the three-year limitations period for Massachusetts tort actions contained in MGL, c. 260, Section 2A, as the statute of limitations governing plaintiff's RICO claims. Plaintiff's complaint having been filed on September 25, 1986, the magistrate found that

plaintiff's claims were barred if they accrued before September 25, 1983. Accordingly, plaintiff's claims based on defendants' alleged misdeeds in the course of plaintiff's prior federal actions were held time-barred because all these claims accrued before August 1983, when the district court entered judgment against plaintiff on the basis of the magistrate's report and recommendation. Plaintiff's other claims, based on the 1972 divestiture of United Brands were held time-barred because they arose no later than 1972 and because principles of collateral estoppel bound plaintiff to the determination in the prior federal action there had been no fraudulent concealment of these claims.

After the district court's judgment, the Supreme Court ruled in Agency Holding Corp. v. Malley-Duff & Associates, In., 107 S. Ct., (2759)(1987), that the four-year statute of limitations governing Clayton Act civil enforcement actions, 15 USC, Section 15b, constituted the applicable limitations period for

civil RICO actions. Thus, plaintiff's claims are time-barred if they accrued before September 25, 1982, not the September 25, 1983 date applied by the magistrate.

Obviously this adjustment does not affact plaintiff's claims based on the 1972 divestiture. Those claims remain long time-barred under the new standard.

Nor does application of the four-year limitations period revive, as timely, any of the plaintiff's RICO claims based on events in the prior federal action. A cause of action under RICO accrues when "a plaintiff knows or should know of the injury" which forms the basis of the plaintiff's action. Bowling v. Founders Title Co., 773 F. 2d 1175, 1178 (11th Cir. 1985), cert. denied, 475 US 1109 (1986).

Plaintiff's RICO claims against each defendant accrued when he was first injured by the defendant's alleged acts, not when the last predicate act for a RICO claim occurred. Id. The allegedly false affidavit of

Laurence Johnson submitted by Palmer and Dodge on DelMonte's behalf was filed on or about August 1, 1979, and the allegedly false interrogatories filed on DelMonte's behalf were filed on June 18, 1981. Furthermore, plaintiff asserts in his brief on appeal that by November 25, 1981, he noticed that the district judge in the prior federal action had turned against him as part of a conspiracy involving Palmer & Dodge, Goodwin, Procter & Hoar, and their clients. Accordingly, we hold that plaintiff's claims under RICO accrued before September 25, 1982, and are, therefore, time-barred even under Agency Holding Corp., supra, 107 S. Ct. 2759.

Plaintiff also purported to bring claims under the Securities Exchange Act of 1934, 15 USC, Section 78n(e). Claims brought under that section, which does not itself specifically provide for a limitation, are subject to the most closely analagous statute of limitations of the forum state, i.e., the

statute of limitations for common law fraud actions. Stull v. Bayard, 561 F. 2d 429, 431 (2nd Cir. 1977), cert. denied, 434 US 1035 (1978). See Cook v. Avien, Inc., 573 F. 2d 685, 694 (1st Cir. 1978); Janigan v. Taylor, 344 F. 2d 781, 783 (1st. Cir.), cert. denied 382 US 879 (1965).

In Massachusetts the limitations period for tort and fraud actions is three years, MGL, c. 260, Section 2A. Accordingly, any securities claim might assert is barred if it accrued before September 25, 1983. However, plaintiff's securities claims are based on his allegation that defendant, Price Waterhouse, wrongfully approved DelMonte's payment of $500,000---characterized by plaintiff as a bribe---to a foreign consultant in connection with the 1972 divestiture. Not only did this payment occur fourteen years before plaintiff filed his complaint, but plaintiff's complaint concedes that the "bribe" was reported in a 1975 article in the Wall Street Journal. Plaintiff's securities claims

under 15 USC, Section 78n are accordingly time-barred.

Insofar as plaintiff purports to bring a variety of common law tort claims (governed by the three-year statute of limitations of MGL c. 260, Section 2A) and claims under the Sherman and Clayton Acts (governed by the four-year statute of limitations of 15 USC, Section 15b), these claims are time-barred and/or precluded under principles of res judicata for reasons stated in the magistrate's report and recommendation and in this opinion.

Defendant/appellee, Covington & Burling's request for sanctions against plaintiff is denied.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HERBERT D. BERKSON
Plaintiff, Appellant

v.

DEL MONTE CORPORATION, ET AL.,
Defendants, Appellees

ORDER OF THE COURT

Entered August 23, 1988

Appellant's letter to Chief Judge Campbell dated August 15, 1988 is treated as a motion to supplement appellant's petition for rehearing in banc. Supplementation of the petition by said letter is hereby permitted.

By the Court

Clerk

(cc: Messrs. Berkson, Galvani, Pirozzolo, Stewart, Rudman, Griffin and Ms. Roach)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HERBERT D. BERKSON
Plaintiff, Appellant

v.

DEL MONTE CORPORATION, ET AL.,
Defendants, Appellees

Before
Campbell, Chief Judge,
Coffin, Bowns, Breyer, Torruella and Selya
Circuit Judges

ORDER OF COURT

Entered September 15, 1988

Appellant's petition for rehearing in banc denied

By the Court

Clerk

(cc: Messrs: Berkson, Pirozzolo, Stewart, Rudman, Galvani, Harding, Oethheimer, Griffin, Martin, Piper, Ms. Kemp and Ms. Roach)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 86-2775-N

HERBERT D. BERKSON

v.

DEL MONTE CORPORATION, ET AL

JUDGMENT IN A CIVIL CASE

Decision by Court. The Court having accepted the recommendation of Magistrate IT IS ORDERED AND ADJUDGED

JUDGMENT FOR THE DEFENDANTS

Date May 29, 1987

George F. McGrath
Clerk

By: Deputy Clerk